No. 16-860

IN THE
Supreme Court of the United States

JAVIER ARELLANO HERNANDEZ,

Petitioner,

v.

JEFFERSON B. SESSIONS III, Attorney General,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

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Respondent focuses its brief in opposition on its argument that *United States v. Castleman*, 134 S. Ct. 1405 (2014), has already resolved the questions presented. But *Castleman* addressed the meaning of "physical force" in an entirely different statutory scheme. In that scheme, "physical force" means "common-law force"—in other words, the force sufficient to commit a common-law battery, which includes mere offensive touching. By contrast, the current case and countless others deal with a statutory scheme in which this Court has established that "physical force" means "violent force." At most, therefore, Respondent's reliance on *Castleman* is a merits argument for extending its reasoning to a new statutory context. This Court commonly grants review to consider the applicability of its recent decisions in distinct legal contexts. *E.g.*, *Beckles v. United States*, 137 S. Ct. 886 (2017).

I. THERE IS AN ADMITTED AND IMPORTANT SPLIT

Respondent does not dispute, nor could it, that the questions presented are of great practical importance. *See* Pet. 16–19. The determination that an offense is a "crime of violence" or a "violent felony" can lengthen sentences and trigger harsh mandatory minimum terms of imprisonment. *See, e.g.*, 18 U.S.C. § 924(c)(1)(A), (e)(1). It can result in increased recommended sentencing ranges under the Guidelines, including through career-offender classification. *See* U.S.S.G. §§ 4B1.1, 2K2.1(a), 2L1.2(b)(2)(E), (b)(3)(E). And, as in this case, it can lead to the removal of a lawful permanent resident without the possibility of discretionary cancellation of removal. *See* 8 U.S.C. §§ 1101(a)(43)(F),

1227(a)(2)(A)(iii), 1229b(a)(3). Because of the variety of contexts in which classification of an offense as a "crime of violence" or "violent felony" matters, and because of the wide variety of state offenses implicated by the questions presented, *see* Br. Opp. 11, the lower courts confront the issue constantly.

Respondent also does not dispute, nor could it, that answering either question presented in the affirmative would invalidate the only ground for Petitioner's removal that the Ninth Circuit approved. *See* Pet. 22–23; Br. Opp. 17 n.8. Respondent quibbles over whether it conceded another issue that the Ninth Circuit did not reach, Br. Opp. 17 n.8, but even if Respondent were correct, that would be no basis to deny review.[1]

Finally, although it asks the Court not to resolve the circuit split, Respondent does not dispute, nor could it, that such a split exists. *Compare, e.g.*,

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[1] The fact that this Court has denied petitions raising similar issues does not mean that it should deny this one. Of the six IFP petitions listed in Respondent's brief, three sought review of a Guidelines provision rather than a statute. *McBride v. United States*, 137 S. Ct. 830 (2017) (No. 16-6475); *Waters v. United States*, 137 S. Ct. 569 (2016) (No. 16-5727); *Rice v. United States*, 137 S. Ct. 59 (2016) (No. 15-9255). As Respondent itself points out, grants of such petitions are unlikely. *See* Br. Opp. 16. One of these was also filed out of time. *See Waters*, 137 S. Ct. 569. A fourth sought review of a two-paragraph unpublished opinion disposing of the issue on plain error review. *Gill v. United States*, 137 S. Ct. 599 (2016) (No. 16-6601). And, unlike here, Respondent did not even deem the fifth and sixth worthy of a response. *Lindsey v. United States*, 137 S. Ct. 413 (2016) (No. 16-6266); *Schaffer v. United States*, 137 S. Ct. 410 (2016) (No. 16-6201).

United States v. Rico-Mejia, __ F.3d. __, 2017 WL 568331, at *2–3 (5th Cir. Feb. 10, 2017), *with, e.g.*, *United States v. Rice*, 813 F.3d 704 (8th Cir. 2016); *see also infra* at 8–11.

Given the clear conflict and importance of the issues, the questions presented are cert-worthy. This case is a clean vehicle to resolve them, and the Court should grant review.

II. *CASTLEMAN* DID NOT RESOLVE THE QUESTIONS PRESENTED BECAUSE IT SPOKE ONLY TO "COMMON-LAW" FORCE

The thrust of Respondent's opposition is its argument that this Court's decision in *Castleman* has already resolved the questions presented. *Castleman* did no such thing. To the contrary, it went to great lengths to distinguish its analysis of the "common-law force" necessary for a "misdemeanor crime of domestic violence" from the "violent force" required for a "crime of violence" or "violent felony." *See* 134 S. Ct. at 1410–16. Thus, while the Court determined that bodily injury cannot be caused without *common-law* force, it expressly reserved the question of "[w]hether or not the causation of bodily injury necessarily entails *violent* force." *Id.* at 1413 (emphasis added).

Castleman called upon this Court to decide whether a crime could qualify as a "misdemeanor crime of domestic violence" when it required only "common-law force," which includes the mere offensive touching that suffices to commit common-law battery. The Court had previously held that such minimal force does not qualify as the violent force that makes an offense a violent crime—i.e., a

"crime of violence" or "violent felony." *See Johnson v. United States*, 559 U.S. 133 (2010); *Leocal v. Ashcroft*, 543 U.S. 1 (2004). *Castleman* determined that, for several reasons, "physical force" for purposes of violent crimes is distinguishable from "physical force" for purposes of domestic violence. For example, the Court noted that "whereas the word 'violent' or 'violence' standing alone 'connotes a substantial degree of force,' that is not true of 'domestic violence.'" 134 S. Ct. at 1411 (quoting *Johnson*, 559 U.S. at 140). The Court ultimately held that a "misdemeanor crime of domestic violence" requires only the "minimal force" needed to commit a common-law battery and that "[i]t is impossible to cause bodily injury without applying force in the common-law sense." *Id.* at 1414–15. A crime requiring bodily injury, therefore, necessarily meets the "physical force" element in the definition of a "misdemeanor crime of domestic violence."

Continuing to distinguish between the "common-law force" required to commit a "misdemeanor crime of domestic violence" and the "violent force" required to commit a "crime of violence" or a "violent felony," *Castleman* expressly declined to decide "[w]hether or not the causation of bodily injury necessarily entails violent force." *Id.* at 1413. True, the Court later stated that "the knowing or intentional causation of bodily injury necessarily involves the use of physical force." *Id.* at 1414. But the Court had just held that "physical force" has a different meaning for the purpose of defining violent crimes. And it clarified again in the very next paragraph that it was "not decid[ing]" whether certain "forms of injury necessitate violent force." *Id.* Instead, it held only

that they "necessitate force in the common-law sense." *Id.*

Respondent insists that these express reservations extended only to the amount of force used, rather than also to how a victim comes to experience the injury. Br. Opp. 9–11. That is mistaken. *Castleman*'s analysis of directly versus indirectly caused injuries was also replete with references to the common law. For example, the Court stated both that "the *common-law concept* of 'force' encompasses even its indirect application" and that "[i]t is impossible to cause bodily injury without applying force *in the common-law sense*." 134 S. Ct. at 1414–15 (emphasis added). For good measure, the Court added that "[f]orce in this sense describes one of the elements of the common-law crime of battery," *id.* at 1414, and that "'the force used' *in battery* 'need not be applied directly to the body of the victim,'" *id.* (emphasis added) (alteration omitted) (quoting 2 W. LaFave, Substantive Criminal Law § 16.2(b) (2d ed. 2003)). Given the effort this Court put into distinguishing common-law force from violent force, these qualifiers would be strikingly out of place had the Court intended to speak to violent force as well.

Nor are *Castleman*'s holdings broadened by the Court's passing reference to *Leocal v. Ashcroft*, 543 U.S. 1 (2004), in addressing the "use" component of the "use of physical force." In that portion of the opinion, the Court merely clarified that *Leocal* held that "use" implied more than negligence, not "that the word 'use' somehow alters the meaning of 'force.'" *Castleman*, 134 S. Ct. at 1415. This clarification hurts rather than helps Respondent's position because it confirms that all of the issues addressed in

Castleman, like the questions presented here, turned on "the meaning of 'force.'" And as *Castleman* emphasized, that meaning differs depending on whether the context is common-law force or violent force.

Just as an amount of force sufficient to qualify as common-law force might not qualify as "violent force," a force sufficiently direct to qualify as common-law force might not qualify as "violent force." As this Court has made clear, the "ordinary meaning of [crime of violence], combined with § 16's emphasis on the use of physical force against another person . . . suggests a category of *violent, active* crimes." *Leocal*, 543 U.S. at 11 (emphasis added). Likewise, apart from equating "physical force" with common-law force for purposes of the statute at issue in *Castleman*, this Court has emphasized the need to give "physical force" its "ordinary meaning." *Johnson*, 559 U.S. at 138. Some crimes involving indirectly applied force—such as shooting another person by pulling a trigger—fall comfortably within a category of "violent, active crimes," as well as within the "ordinary meaning" of "force." But that does not mean that all do.

Contrary to Respondent's assertion, it certainly is "plausible" that a crime involving great bodily injury could be threatened without the threat of violent force. Br. Opp. at 9–10. As Respondent acknowledges in a footnote, the Petition gives the example of a "threat[] to deprive vulnerable persons of care or to subject them to hazardous conditions." Br. Opp. 10 n.5 (citing Pet. 21). Respondent weakly suggests that "it would hardly be incongruous to treat [such threats] as threats of violent force." Br.

Opp. 10 n.5. That is incorrect. It would indeed be "incongruous," particularly given this Court's description of crimes of violence as "a category of violent, active crimes," *Leocal*, 543 U.S. at 11, and its admonition that "physical force" be interpreted according to its "ordinary meaning," *Johnson*, 559 U.S. at 138.[2]

In all events, these are merits issues. Respondent seeks an extension of *Castleman* to the context of an entirely different statutory scheme. Whether that extension is warranted, based either on *Castleman*'s reasoning or on Respondent's other merits arguments, *see* Br. Opp. 11, is precisely the sort of question that is fit for this Court's consideration. Indeed, this Court granted certiorari in *Castleman* itself to resolve the question of whether its analysis in *Johnson* extended to the separate statutory scheme governing misdemeanor crimes of domestic violence.

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[2] Respondent also argues that "[i]t is unclear whether Section 422 would apply to such threats," which, under the statute, must be "'so unequivocal, unconditional, immediate, and specific' as to cause the victim to be in 'sustained fear for his or her own safety or for his or her immediate family's safety.'" Br. Opp. 10 n.5. But the type of threat identified above, such as a parent's threat to an ex-spouse to withhold their diabetic child's insulin, easily could be made in the manner described by the unambiguous statutory text. Cal. Penal Code § 422(a); *see id.* § 273a. The statute means what its text clearly and unambiguously says, *see Stephens v. County of Tulare*, 134 P.3d 288, 293 (Cal. 2006), and Respondent lacks support for its vague suggestion that there is no "realistic probability" of the statute being applied in accordance with its plain meaning, Br. Opp. 10 n.5 (internal quotation marks omitted).

III. THE LOWER COURTS REMAIN DIVIDED ON THE QUESTIONS PRESENTED

Further evidence that *Castleman* did not resolve the questions presented comes from the lower courts' continuing confusion over whether bodily injury necessarily entails violent force. Respondent seeks to minimize this split in authority by noting that many of the cases cited in the Petition predate *Castleman* and that *some* post-*Castleman* decisions agree with Respondent's reading. *See* Br. Opp. 12–13. But that ignores the scope of the disagreement that has persisted in the years since *Castleman*, including disagreement specifically as to the decision's impact in the context of violent crimes.

For example, the Fourth Circuit has rejected the idea that *Castleman* abrogated *United States v. Torres-Miguel*, 701 F.3d 165 (4th Cir. 2012), and the distinction it drew between using violent force and causing bodily injury. *United States v. McNeal*, 818 F.3d 141, 156 n.10 (4th Cir. 2016) ("The government suggests that . . . *Castleman* . . . has abrogated the distinction that we recognized in *Torres-Miguel* between the use of force and the causation of injury. That strikes us as a dubious proposition. . . . *Castleman* . . . expressly reserved the question of whether causation of bodily injury 'necessarily entails violent force.'" (dicta) (internal citations omitted)). Thereafter, quoting this language, the Eastern District of Virginia recognized that *Torres-Miguel* remained good law in the Fourth Circuit despite arguments that *Castleman* had abrogated it. *United States v. Poindexter*, No. 3:97-cr-00079, 2016 WL 6595919, at *4 (E.D. Va. Nov. 7, 2016). It further explained: "While *Castleman* held that '[i]t is

impossible to cause bodily injury without applying force in the common-law sense,' the force clause in *Torres-Miguel* requires more than force in the common-law sense. Accordingly, this Court must follow the holding set forth in *Torres-Miguel*." *Id.* at *5 (internal citations omitted).

Likewise, as Respondent acknowledges, Br. Opp. 15, the Fifth Circuit has recently reaffirmed its holding that causing bodily injury does not necessarily require violent force. *Rico-Mejia*, 2017 WL 568331, at *2–3. The Fifth Circuit noted that "[b]y its express terms, *Castleman*'s analysis is applicable only to crimes categorized as domestic violence, which import the broader common law meaning of physical force." *Id.* at *3. Accordingly, it explained, "*Castleman* is not applicable to the physical force requirement for a crime of violence, which 'suggests a category of violent, active crimes' that have as an element a heightened form of physical force that is narrower in scope than that applicable in the domestic violence context." *Id.* Although Respondent notes the existence of a pending rehearing petition and the fact that the court could have reached the same outcome on alternate grounds, Br. Opp. 15–16, neither undermines this ruling's force.

Moreover, Judge Kelly's dissent from the Eighth Circuit's decision treating the causation of bodily injury as necessarily involving violent force post-dated—and specifically grappled with—*Castleman*. *See Rice*, 813 F.3d at 706–08 (Kelly, J., dissenting). As Judge Kelly concluded, "[t]his question could not have been implicitly resolved by *Castleman*, for the majority opinion there explicitly reserved it." *Id.* at

707. Similarly, in a case decided two years after *Castleman*, Judge White concurred separately to reiterate her continuing disagreement with the Sixth Circuit's conclusion that causation of bodily injury suffices to establish violent force. *United States v. Jackson*, 655 F. App'x 290, 293 (6th Cir. 2016) (White, J., concurring) (citing *United States v. Anderson*, 695 F.3d 390, 403–06 (6th Cir. 2012) (White, J., concurring)).

Disagreement also persists in the district courts. Thus, in the Tenth Circuit, at least one district court has rejected the idea that *Castleman* abrogated circuit precedent distinguishing between causing bodily injury and using physical force, *United States v. Watts*, No. 14-CR-20118, 2017 WL 411341, at *4–9 (D. Kan. Jan. 31, 2017) (concluding that *Castleman* did not abrogate *Perez-Vargas* and similar cases and holding that a Missouri statute did not specify a crime of violence), while another has reached the opposite conclusion, *Pikyavit v. United States*, No. 2:06-cr-407, 2017 WL 1288559, at *6–7 (D. Utah Apr. 6, 2017) (holding that "insofar as *Perez–Vargas* indicates that deliberate applications of physical force through indirect means are not a 'use . . . of physical force against the person of another[,]' the decision's reasoning is limited by *Castleman*").

Meanwhile, some courts have held that *Castleman* is decisive in the violent crimes context for certain methods of causing injury but not for others. Thus, the Middle District of Pennsylvania concluded that under *Castleman* an affirmative act that caused bodily injury, even indirectly, qualified as the use of violent force, but that the same could not be said of an omission, such as "withholding food

and medical care from a child." *United States v. Harris*, 205 F. Supp. 3d 651, 671–72 (M.D. Pa. 2016); *see also United States v. Weygandt*, CR No. 9-324, 2017 WL 818844, at *2 & n.3 (W.D. Pa. Mar. 2, 2017) (noting disagreement among district courts in the Third Circuit on this issue, but agreeing with *Harris*); *cf. United States v. Guzman-Fuentes*, No. 1:16-CR-376, 2017 WL 1227952, at *3–4 (N.D. Ga. Apr. 3, 2017) ("[A] person can . . . maliciously inflict excessive pain upon a child by depriving the child of medicine or by some other act of omission that does not involve the use of physical force.").

* * *

If *Castleman* made the answers to the questions presented as clear as Respondent insists it did, the lower courts would not continue to exhibit such striking disagreement. Instead, the issue continues to divide the courts in the context of a wide range of immigration and criminal statutes and Guidelines provisions. The life-changing consequences of these proceedings should not turn on the circuit in which they are brought. The time has come for this Court to resolve the question it expressly reserved in *Castleman*.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari.

Respectfully submitted,

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